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FEDERAL COMMUNICATIONS COMMISSION
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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accounting for Judgments and Other Costs Associated with Litigation	)	CC Docket No. 93-240

REPLY COMMENTS OF BELLSOUTH

BellSouth Telecommunications, Inc. ("BellSouth") hereby submits its reply comments in the captioned proceeding in accordance with the Notice of Proposed Rulemaking ("NPRM"), FCC 93-424, released September 9, 1993.

Only ten parties filed comments in response to the NPRM. Eight oppose the proposed rules.[1] Only one interexchange carrier[2] and one individual[3] support the Commission's proposal. Neither party provides a rationale sufficient to support a change in the rules.

The Comments justify the following findings:

-- The proposed rules are unnecessary.[4]

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[1] Comments opposing the Commission's proposal were filed by the Ameritech Operating Companies ("Ameritech"), the Bell Atlantic Telephone Companies ("Bell Atlantic"), BellSouth, COMSAT Corporation ("COMSAT"), the NYNEX Telephone Companies ("NYNEX"), Pacific Bell and Nevada Bell ("Pacific"), Southwestern Bell Telephone Company ("SWBT"), the United States Telephone Association ("USTA") and U S West Communications, Inc. ("U S West").

[2] Comments of MCI Telecommunications Corporation ("MCI").

[3] Comments of Scott J. Rafferty ("Rafferty").

[4] Bell Atlantic at 2; BellSouth at 10-17; COMSAT at 3-4; SWBT at 4-5; USTA at 12-18; U S West at 4.

-- The proposed rules are contrary to the judicial standard for measuring a carrier's cost of service.[5]

-- No special accounting or ratemaking rules are justified for antitrust judgments.[6]

-- The extension of the scope of the proposed rules to other statutory claims is unwarranted.[7]

-- The proposed treatment of settlements violates public policy.[8]

-- Deferred accounting for litigation costs is inappropriate.[9]

-- Any perceived benefit from the proposed rules is greatly outweighed by the costs that would be imposed.[10]

-- The proposed rules will provide carriers and others with perverse incentives.[11]

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[5] BellSouth at 4, 6-7, 10; COMSAT at 1-4; Pacific at 3-4; SWBT at 5-8; U S West at 5.

[6] BellSouth at 24-28; COMSAT at 9-12; U S West at 6-7.

[7] Bell Atlantic at 4; BellSouth at 34-36; COMSAT at 24; NYNEX at 17-19; Pacific at 16-17; SWBT at 27-29; USTA at 29-30; U S West at 11-12.

[8] BellSouth at 28-31; COMSAT at 13-20; NYNEX at 8-11; Pacific at 5-11; SWBT at 14-15; USTA at 22-23; U S West at 8-9.

[9] Ameritech at 3; Bell Atlantic at 2-3; BellSouth at 11-13 and 31-34; COMSAT at 20-24; NYNEX at 14-16; Pacific at 14-16; SWBT at 19-22; USTA at 18-22; U S West at 9-11.

[10] Bell Atlantic at 2; BellSouth at 17-24; SWBT at 22-26; USTA at 26-29; U S West at 12.

[11] Ameritech at 3; BellSouth at 21-24; COMSAT at 8-16; NYNEX at 12; Pacific at 7, 10, 13; SWBT at 10, 16-19, 22-26.

-- The interim rule adopted by the Commission must be rescinded.[12]

Among the parties opposing the Commission's proposed rules generally, two support the application of below-the-line accounting to antitrust judgments only.[13] Neither party provides any support for their proposal.[14]

In its Comments, BellSouth demonstrated that there is a fine line between vigorous competition and conduct which may, with 20-20 hindsight, be found to have violated the antitrust laws.[15] BellSouth gave an example in which AT&T's interconnection policy was held by one court to be lawful and by another court to constitute an antitrust violation.[16] In its Comments, COMSAT cites several cases in which courts noted that it is in the public interest to permit dominant firms to engage in vigorous competition.[17]

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[12] BellSouth at 36-38; COMSAT at 24-25.

[13] NYNEX at 7; Pacific at 4. See also MCI at 3-4.

[14] NYNEX states at 7: "We concur with the FCC's proposal. Since the costs result from an antitrust violation as finally determined by the court, those costs can reasonably be presumed not to benefit ratepayers." Pacific is even more cryptic at 4: "The Pacific Companies concur with this aspect of the proposed new rules."

[15] BellSouth at 21-24. See also COMSAT at 9-12.

[16] BellSouth at 24-26. See also U S West at 6-7.

[17] COMSAT at 10, citing Cargill v. Monfort of Colo., Inc., 479 U.S. 104,116 (1986); Ball Memorial Hospital, Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1338, reh'g. denied, 788 F.2d 1223 (7th Cir. 1986) ("...to deter aggressive conduct is to deter competition..."); Matsushita Electric

(continued...)

As the record demonstrates, adverse judgments in antitrust cases are very rare. However, competitive decisions must be made daily by carriers. Decisions made prudently and in good faith may later be adjudged to have exceeded the bounds of lawful competition. However, if the Commission adopts draconian rules that dull the willingness of carriers to compete vigorously, ratepayers will surely be the losers.

The existing rules permit the Commission to review carrier conduct in context during the ratemaking process. No new accounting rules or ratemaking presumptions are needed for the Commission to fulfill its statutory responsibilities in this regard. BellSouth therefore respectfully disagrees with NYNEX and Pacific on this issue.

MCI supports the proposals in the NPRM. Indeed, MCI proposes that the Commission go even further. For example, where the Commission proposes that an adjudged violation of federal law will create a rebuttable presumption against recovery, MCI proposes that the Commission "presume conclusively that violations of federal law are not in the public interest."[18]

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[17](...continued)
Industrial Co., v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) ("...mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.")

[18] MCI at 2.

MCI misses the point. No one would argue that violation of federal law is in the public interest. The issue, however, is whether the conduct of the carrier was reasonable and prudent when it occurred, not whether it was later adjudged to be a violation of law. In the Litigation Costs Decision[19] the Court gave an example of a carrier that made the "right" decision, i.e., a decision that "at the time it was undertaken, reasonably [could] be expected to produce a net benefit to ratepayers"[20], which "turned out to be the 'wrong' decision as a matter of how the law was finally interpreted."[21] The Court vacated the prior rules because the Commission failed to explain "why ratepayers are generally harmed in some non-economic way by the violation of federal statutes."[22] MCI provides no justification for the disallowance of prudently incurred costs simply because the conduct is later adjudged to have violated one of the myriad federal statutes governing our daily lives.

MCI suggests that new rules are needed to impose on the carrier "the burden of demonstrating how its wrongdoing produced a benefit for ratepayers."[23] The existing

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[19] Mountain States Tel. and Tel. Co., et al., v. FCC, 939 F.2d 1035 (D.C. Cir. 1991) ("Litigation Costs Decision").

[20] Litigation Costs Decision, 939 F.2d at 1044.

[21] Id. at 1045.

[22] Id.

[23] MCI at 4.

ratemaking procedures provide a forum for Commission review of the prudence of carrier conduct. Under the existing rules, if the prudence of conduct giving rise to an antitrust violation is questioned, the carrier has the burden of proving the prudence of its conduct. No new rules are needed to establish the carrier's burden of proof.

MCI next asserts that in the absence of the proposed rules, carriers will have a "perverse incentive to violate federal laws."[24] This assertion is patently absurd. The adverse consequences that result from a statutory violation provide carriers with sufficient incentive to obey the law. As SWBT correctly notes in its comments:

> The antitrust laws impose severe criminal penalties, including imprisonment, for misconduct. The same is true for violations of other federal statutes. Criminal penalties may be imposed not only on the corporation but also the employees involved. ... Further, there is no guarantee of recovery because under the traditional standards the expense is subject to challenge and may be disallowed. The lack of a presumption for disallowance simply does not encourage carriers to violate the law or treat it with any less respect.[25]

MCI suggests that the presumptive disallowance policy should be extended to violations of all other federal statutes.[26] MCI provides no response to the Court's requirement that the Commission "provide the needed

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[24] MCI at 5.

[25] SWBT at 13-14.

[26] MCI at 5.

justification" for extending the presumptive disallowance policy to other federal statutory violations, and that the Commission "articulate a reason for the line it has chosen".[27] In the absence a rational basis for MCI's proposal, it must be rejected.

MCI next argues that if the presumptive disallowance policy is not extended to all federal statutes, it at least be extended to cases involving violations of the Communications Act.[28] MCI asserts that "it is difficult to imagine a situation in which a carrier would be able to prove that violating the Communications Act produced a benefit for ratepayers."[29]

This is a strange assertion coming from a carrier that has itself recently been adjudged to have violated the Communications Act. In AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), MCI was adjudged to have violated Section 203 of the Communications Act by charging off-tariff rates. MCI defended on the ground that it was simply following established FCC policy in its tariffing decisions. MCI presumably engaged in this practice in an effort to compete effectively for ratepayer business, or to provide a specialized package of services that its customers required. Yet despite MCI's good faith and reasonable reliance on

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[27] Litigation Costs Appeal, 939 F.2d at 1046.

[28] MCI at 5.

[29] MCI at 6.

prior FCC decisions, it was adjudged to have violated the Communications Act.

The Communications Act is a regulatory statute that contains broad principles rather than specific rules of conduct. Carriers are required to "furnish communications service upon reasonable request therefor".[30] They are admonished that "all charges, practices, classifications, and regulations for or in connection with such communications service shall be just and reasonable".[31] They are required to avoid "unjust or unreasonable discrimination".[32] The extremely general nature of the requirements of the Communications Act makes continuous compliance a virtual impossibility. Indeed, it is the very flexibility of these general requirements that permit the Commission to tailor its regulatory requirements to changing times and conditions.

The Act contains numerous regulatory devices to ensure that these strictures are followed, including provisions for investigation of proposed tariffs, suspension pending investigation, refunds and damages to customers adversely affected by a carrier's violation of the standards set forth in the act. Willful violations of the Act are punished by

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[30] 47 U.S.C. § 201(a).

[31] 47 U.S.C. § 201(b).

[32] 47 U.S.C. § 202(a).

fines, forfeitures and even imprisonment.[33] MCI offers no explanation as to why new accounting rules and ratemaking presumptions are required to protect ratepayers against carrier violations of the Communications Act.

MCI proposes the disallowance of both pre-judgment and post-judgment settlements and avoided litigation costs.[34] MCI does not discuss the Court's concerns with the prior rules in these areas. BellSouth has demonstrated at length in its comments why these proposals are contrary to law and public policy.[35]

Rafferty makes certain allegations regarding NYNEX that, ironically, demonstrate the superiority of the present rules to those proposed in the NPRM. Rafferty alleges imprudence on the part of NYNEX for spending millions of dollars in legal fees defending itself against a wrongful discharge suit brought by Rafferty, and against allegations that a nonregulated NYNEX subsidiary violated the 1982 AT&T Consent Decree ("MFJ"). Rafferty alleges that NYNEX allocated 90 percent of these litigation costs to the regulated accounts of the NYNEX telephone companies.[36]

Rafferty alleges that the New York Public Service Commission disallowed the cost of his wrongful discharge

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[33] 47 U.S.C. §§ 202(c) and 501-504.

[34] MCI at 7-9.

[35] BellSouth at 28-34.

[36] Rafferty at 2.

suit and the MFJ enforcement action in a ratemaking proceeding. The Commission's rationale was based not on the outcome of the litigation[37], but rather on its finding that these costs were not necessary expenses of the regulated telephone company.[38]

Under existing ratemaking procedures, costs which are imprudently incurred or unnecessary to the regulated operations of the carrier are subject to disallowance. That is precisely what Rafferty alleges occurred in the proceeding before the New York Public Service Commission. On the other hand, under the proposed rules, the costs incurred in connection with these suits would not be subject to below the line accounting, since neither involves an alleged violation of a federal statute. A traditional ratemaking proceeding would still be required to evaluate these expenses. Rafferty's comments demonstrate the superiority of the existing rules to those proposed in the NPRM.

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[37] Rafferty at 3 quotes the New York Commission as finding: "The question of who should bear the costs of defending against meritorious claims...is more problematic, but barring exceptional circumstances, we believe these costs, too, should be recoverable from ratepayers."

[38] Rafferty was employed by a nonregulated affiliate, and the conduct investigated by the Justice Department involved activities by NYNEX and its unregulated subsidiary, Telco Research. Rafferty at 3.

The record demonstrates that the Commission's present accounting and ratemaking rules for litigation costs are adequate. This proceeding should be terminated.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By its Attorney:

M. Robert Sutherland
4300 Southern Bell Center
675 W. Peachtree Street, N.E.
Atlanta, Georgia 30375
404 529-3854

November 5, 1993

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of November, 1993 serviced all parties to this action with a copy of the foregoing REPLY COMMENTS OF BELLSOUTH by placing a true and correct copy of same in the United States mail, postage prepaid, addressed to the parties as set forth on the attached service list.

Gordana Coley

Accounting and Audits Division
Common Carrier Bureau
Room 257
2000 L Street, N.W.
Washington, DC 20554

Ameritech
Barbara J. Kern
4H88
2000 W. Ameritech Center Drive
Hoffman Estates, IL 60196-1025

James L. Wurtz
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004

Loretta J. Garcia
Donald J. Elardo
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

New York Telephone Co. &
New England Tel & Tel Co.
Mary McDermott
Campbell L. Ayling
120 Bloomingdale Road
White Plains, NY 10605

USTA
Martin T. McCue
Suite 800
900 19th Street, N.W.
Washington, DC 20006-2105

Charles H. Kennedy
Fletcher, Heald & Hildreth
11th Floor
1300 North 17th Street
Rosslyn, VA 22209

Scott J. Rafferty
4730 Massachusetts Avenue
Washington, DC 20016

James P. Tuthill
Room 1526
140 New Montgomery Street
San Francisco, CA 94105

Philip Verveer
John McGrew
Francis Buono
Willkie Farr & Gallagher
Three Lafayette Centre
Suite 600
1155 21st Street, N.W.
Washington, DC 20036-3384

U S West Communications
Robert B. McKenna
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

Southwestern Bell Telephone
Richard C. Hartgrove
Bruce E. Beard
Robert M. Lynch
Room 3520
One Bell Center
St. Louis, MO 63101

Bell Atlantic
Lawrence W. Katz
1710 H Street, N.W.
Washington, DC 20006